

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ROSETTA ELANE BRACKETT</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>SOS STAFFING SERVICES INC. A/K/A</b>	)	
<b>CENTURY PERSONNEL</b>	)	
Respondent	)	Docket No. 1,010,679
	)	
AND	)	
	)	
<b>ACE AMERICAN INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Both parties request review of the June 27, 2003 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant suffered accidental injury arising out of and in the course of employment and that timely notice was given within 10 days. The ALJ awarded the claimant temporary total disability benefits at the rate of \$190.18 per week beginning April 12, 2003, through April 28, 2003, as well as medical treatment with Dr. James Warren.

The respondent and its insurance carrier request review of: (1) whether the ALJ erred in finding the claimant sustained accidental injury arising out of and in the course of employment; (2) whether the ALJ erred in finding the claimant gave timely notice; and, (3) whether the ALJ erred in awarding the claimant temporary total disability benefits.

The sole issue raised on review by the claimant is whether the ALJ erred in limiting the claimant's temporary total disability benefits to the period set forth in the ALJ's Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Board concludes the ALJ's Order should be affirmed.

The respondent, a temporary employment agency, sent claimant to perform temporary work for Boater's World in Topeka, Kansas. On April 11, 2003, claimant was performing her job duties as a stocker. Claimant testified that she was lifting a 30-pound box up to Danny Braden who was on a ladder. As claimant lifted the box she felt a popping sensation between her left shoulder and neck. She told Mr. Braden to grab the box because her arm was giving out. Claimant testified that her supervisor, Kellie Wellman, was nearby and that Mr. Braden and Kellie Wellman, told her to go rest after the incident.

The incident occurred at the end of her workday. Claimant's condition worsened and she sought medical treatment on Sunday night, April 13, 2003, at Stormont-Vail emergency room. Claimant indicated she called respondent and left a message on the answering machine that she was going to the emergency room. The emergency room records indicate claimant complained of pain in her left neck and shoulder from lifting two days ago. The medical records also noted under a "circumstances" section that the injury was work related.<sup>1</sup> Claimant was provided an injection, medications and her arm was placed in a sling.

Claimant testified that on Monday she told respondent's staffing manager that she had been injured working at Boater's World the previous Friday. The staffing manager, Amy Bouska, denied there were any messages on the answering machine on Sunday, and she denied claimant said anything about a work-related injury. Both Mr. Braden and Ms. Wellman also denied claimant complained about a work-related injury on Friday, April 11, 2003.

In workers' compensation litigation, it is claimant's burden to prove entitlement to benefits by a preponderance of the credible evidence.<sup>2</sup> This matter hinges almost entirely upon the credibility of the witnesses. All the witnesses – claimant as well as Ms. Wellman, Ms. Bouska and Mr. Braden – testified before the ALJ at the preliminary hearing. In granting claimant the benefits requested, the ALJ apparently determined the claimant more credible than respondent's witnesses. The Board generally will give some deference to the determination by an ALJ regarding the credibility of the witnesses who testify before him or her. And in this instance, the contemporaneous medical records from claimant's initial visit to the emergency room indicate she provided a consistent history of a work-related accident. Consequently, the Board affirms the ALJ's determination that claimant suffered an accidental injury arising out of and in the course of her employment and provided timely notice.

Claimant and respondent both contend the ALJ erred in the determination of claimant's entitlement to temporary total disability benefits. This is an appeal from a

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<sup>1</sup> P.H. Trans., Cl. Ex. 1.

<sup>2</sup> See K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

preliminary hearing order. The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Is there any defense to the compensability of the claim?<sup>3</sup>

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.<sup>4</sup>

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Therefore, Judge Benedict did not exceed his jurisdiction.

The issue of whether claimant's medical condition and employment situation entitle claimant to receive temporary total disability benefits is not an issue that is reviewable from a preliminary hearing order. At this juncture of the proceeding, the Board does not have the authority to reweigh the evidence and redetermine if claimant is temporarily and totally disabled.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.<sup>5</sup>

**WHEREFORE**, it is the finding of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated June 27, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2003.

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BOARD MEMBER

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<sup>3</sup> K.S.A. 44-534a(a)(2).

<sup>4</sup> K.S.A. 2002 Supp. 44-551(b)(2)(A).

<sup>5</sup> K.S.A. 44-534a(a)(2).

c:     John M. Ostrowski, Attorney for Claimant  
       Gary R. Terrill, Attorney for Respondent and its Insurance Carrier  
       Bryce D. Benedict, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director